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BY HAND and ECF
Hon. Kenneth M. Karas
United States District Court
Southern District of New York
500 Pearl Street
New York, New York 10007

Re: *United States v. Yaw Nketia* 06 Cr. 893 (KMK)

Dear Judge Karas:

Defendant Yaw Nketia respectfully submits the following letter in lieu of a formal motion *in limine*. Defendant seeks an order, pursuant to Rules 402, 403 and 404(b) of the Federal Rules of Evidence, precluding the Government from introducing non-relevant, prejudicial and misleading evidence of uncharged crimes that would confuse and mislead the jury, unnecessarily lengthen the trial and impermissibly broaden the scope of the Indictment.

Background

Defendant, the owner of Caesar Tax & Brokerage Services, is charged in a 14-count Indictment with preparing federal income tax returns and supporting schedules that contained false and fraudulent information, including false dependents and overstated deductions. Ind. ¶ 3. The Indictment alleges that as a result of the inclusion of this false and fraudulent information on the returns and schedules, defendant generated earned income tax credits and tax refunds to which clients were not entitled. *Id.* Although the Indictment alleges that the fraudulent scheme took place "from in or about at least 2000, through in or about 2003," the tax return filings in the 14-counts are limited to a two year period, from 2000 through 2002. *Id.* ¶¶ 3, 4.

The Government has provided defense counsel with notice that it may offer the following 404(b) evidence at trial:

1. an undercover operation conducted at the defendant's office on April 9 & 10, 2003;

2. tax returns prepared by defendant for tax years 1999 through 2003, and analyses thereof that reflect a pattern of false statements consistent with the false returns charged in the Indictment;

3. the number of tax returns prepared by defendant for each of the tax years 1998 through 2004; and

4. refund rates for returns prepared by defendant in each of the tax years 1998 through 2004.

For the reasons set forth below, defendant seeks an Order precluding the Government on its case-in-chief from introducing non-relevant, prejudicial and misleading evidence of uncharged crimes that would expand the scope of the Indictment, unnecessarily lengthen the trial, confuse and mislead the jury and attempt to show that defendant has a propensity to commit criminal conduct.

Argument

The purpose of the Federal Rules of Evidence is to "secure fairness in the administration" of the law so that "the truth may be ascertained and proceedings justly determined." Fed. R. Evid. 102. To ensure that proceedings are justly determined, "[e]vidence which is not relevant is not admissible." Fed. R. Evid. 402. "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination more probable or less probable than it would be without the evidence." Fed. R. Evid. 401.

Rule 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by

considerations of undue delay, waste of time or needless presentation of cumulative evidence." Fed. R. Evid. 403. "Under Rules 401 and 403 of the Federal Rules of Evidence, in order for evidence to be admissible it must be relevant and its prejudicial effect must not substantially outweigh its probativeness." *United States v. Harvey*, 991 F.2d 981, 996 (2d Cir. 1993).

Rule 404(b) provides that evidence of other crimes, wrongs or acts is not admissible to prove the character of the defendant in order to show action in conformity therewith. Fed. R. Evid. 404(b). Such evidence may be admissible, however, as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. *Id.*

The Second Circuit uses a three-prong test to determine whether evidence of extrinsic acts is admissible under Rule 404(b). *United States v. Mickens*, 926 F.2d 1323, 1328 (2d Cir. 1991). As a general rule, other crimes evidence is admissible unless it is introduced for the sole purpose of showing defendant's bad character, it is not relevant under Rule 402, or it is overly prejudicial under Rule 403. *Id.*

I. The April 2003 Undercover Operation

On April 9 and 10, 2003, IRS agents conducted an undercover operation at defendant's office that was recorded on audio and video tape. An IRS agent posed as Jeanine Andrade, who claimed that she was from Nigeria and had two children who did not reside with her in the United States. During the April 9th operation, defendant informed Ms. Andrade that because her children did not reside in the United States she could not claim them as dependents. Defendant suggested that Ms. Andrade may be able to claim someone else's dependent children on her tax return if that person had not previously claimed the children on his or her tax return. On April 10th, the undercover agent returned to defendant's office and a tax return was submitted using the fictitious name and claiming two dependent "foster children." Defendant was not charged in connection with filing the Andrade tax return.

The Government seeks to introduce evidence of the undercover operation to prove intent and knowledge. Because defendant is not charged in connection with the undercover operation and the recordings appear to have occurred after the crimes charged in the Indictment, the evidence is not relevant, highly prejudicial, will confuse and mislead the jury, unnecessarily lengthen the trial and should be excluded.

A court must be vigilant in enforcing the Fifth Amendment's requirement that a person be tried only on the charges contained in the Indictment returned by the Grand Jury. *See United States v. Mollica*, 849 F.2d 723, 729 (2d Cir. 1988). "The very purpose of the requirement that a man be indicted by the grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge." *United States v. Zingaro*, 858 F.2d 94, 98 (1988), *citing Stirone v. United States*, 361 U.S. 212, 218 (1960). After an Indictment has been returned, its charges may not be broadened except by the Grand Jury, and a court cannot permit a defendant to be tried on charges that are not found in the Indictment. *United States v. Fasciana*, 226 F. Supp.2d 445, 449 (S.D.N.Y. 2002). An unconstitutional amendment of the Indictment occurs when the charging terms are altered, resulting in a likelihood that a defendant will be convicted of an offense not charged by the Grand Jury. *United States v. Wozniak*, 126 F.3d 105, 109 (2d Cir. 1977).

The introduction of evidence regarding the undercover operation will broaden the Indictment and create an impermissible risk that either defendant will be convicted of a crime for which he has not been charged, or that the jury will convict because it believes that he is a bad person who deserves punishment. *Wozniak*, 126 F.3d at 109. In *Wozniak*, defendant was indicted for cocaine and methamphetamine transactions. At trial, the Government also introduced evidence of marijuana transactions and defendant was convicted. The Second Circuit reversed and found that the Indictment had been constructively amended by the admission of the marijuana evidence. *Id.* at 111; *see also*, *Zingaro*, 858 F.3d at 102-03(introduction of extortionate

act not alleged in the Indictment amounted to constructive amendment).

Here, the introduction of evidence of the undercover operation will constructively amend the Indictment and create a likelihood that defendant will be convicted for an act not charged in the Indictment. At a minimum, the evidence will prove facts materially different from those alleged in the Indictment and will amount to a prejudicial variance. *See United States v. Dupre*, 462 F.3d 131, 140 (2d Cir. 2006)(discussing difference between constructive amendment and variance).

In addition to impermissibly broadening the scope of the Indictment, evidence of the undercover operation should also be excluded because it appears that the undercover operation occurred after the criminal conduct charged in the Indictment.[1] While nothing in Rule 404(b) prohibits the use of subsequent evidence if it otherwise meets the Rule's criteria, *United States v.* Germosen, 139 F.3d 120, 128 (2d Cir. 1998), evidence of the undercover operation is not relevant to show defendant's intent and knowledge for acts that occurred years earlier. *See United States v. Gordon*, 987 F.2d 902, 909 (2d Cir. 1993); *United States v. Sergentakis*, S1 05 Cr. 230, 2006 WL 1004468, at *2-3 (S.D.N.Y. Apr. 17, 2006). Because there was an extensive lapse of time between many, if not all, of the tax filings in the Indictment and the undercover operation, the Government cannot show sufficient similarities in time and manner to establish relevance to the charged conduct.

The probative value of the undercover operation evidence is also substantially outweighed by the danger of prejudice to the defendant. As the Supreme Court noted in *Old Chief v. United States*, 519 U.S. 172, 181 (1997), "[a]lthough propensity evidence is relevant, the risk that a jury will convict for crimes other than those charged--or that, uncertain of guilt, it will convict anyway because a

[1] Counts One through Seven of the Indictment refer to tax returns filed in 2000 and 2001 and prior to the undercover operation. Although Counts Eight through Fourteen refer to tax returns filed on April 15, 2003, upon information and belief all of the returns in those Counts were filed prior to the April 2003 undercover operation.

bad person deserves punishment--creates a prejudicial effect that outweighs ordinary relevance."

In the event the Court determines that the undercover operation evidence is admissible, the Court should nonetheless exclude the videotape recording. The Government recently provided counsel with a copy of the videotape, which is poor quality and apparently was recorded upside down. The Government has also informed counsel that a large portion of the tape is missing and that the videotape is incomplete. Because a substantial portion of the videotape is missing, the recording as a whole is untrustworthy and should not be admitted at trial.[2] *See United States v. Bryant*, 480 F.2d 785, 790 (2d Cir. 1973).

II. Tax Returns/Analyses for the Years 1999 through 2003

The Government has provided notice that it may introduce evidence of "tax returns prepared by the defendant for tax years 1999 through 2003, and analyses thereof, that reflect a pattern of false statements consistent with the specific false returns charged in the Indictment." Because the charges in the Indictment are limited to tax return filings in tax years 2000 through 2002, admission of the above evidence would constructively amend the Indictment and violate defendant's Fifth Amendment rights. *See supra* I.

The admission of additional tax returns and analyses for the tax years 1999 through 2003 would significantly broaden the charges contained in the Indictment and result in defendant being tried on charges not returned by the Grand Jury. The charges in the Indictment are very specific and are limited to fourteen different tax filings for the tax years 2000 through 2002.[3]

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[2] The Government has indicated that it may only seek to introduce "still" photographs that were captured from the video recording. In light of the missing portion of the videotape, any evidence garnered from the recording should be deemed untrustworthy and inadmissible.

[3] While the fourteen counts in the Indictment are limited to filings in tax years 2000-2002, the Government alleges that the fraudulent scheme spanned a somewhat longer period, 2000 through 2003. Ind. ¶ 3.

While the Government may be afforded some latitude in presenting background evidence of the alleged fraudulent scheme, Ind. ¶ 3, there is no reason to allow evidence in the form of hundreds of tax returns and analyses for the tax years 1999 through 2003. Defendant submits that the introduction of such evidence would broaden and constructively amend the Indictment and create a likelihood that he would be convicted for acts not found by the Grand Jury. *Wozniak*, 126 F.3d at 109; *Zingaro*, 858 F.3d at 102-03; *Fasciana*, 226 F. Supp.2d at 449.

The evidence should also be excluded because it is not relevant and its probative value is substantially outweighed by its prejudicial effect. Although the first fraudulent tax return filings are alleged to have occurred in 2000, the Government is seeking to introduce returns and analyses from 1999. Alleged criminal acts that occurred in 1999 are not relevant to the fourteen alleged fraudulent tax returns filed years later. The probative value of acts that predate the allegations in the Indictment is also minimal, and is significantly outweighed by the prejudicial effect of such propensity evidence. *See United States v. Newton*, S1 01 Cr. 635, 2002 WL 230964, at *4-5 (S.D.N.Y. Feb. 14, 2002)

Accordingly, for the forgoing reasons the Government should be precluded from offering evidence of tax returns and analyses for the time period beyond that alleged in the Indictment.

III. Number of Tax Returns and Refund Rates for Returns Prepared by Defendant for Tax Years 1998 through 2004

The Government has also provided notice that it may introduce evidence regarding the number of tax returns and the refund rates for tax returns prepared by the defendant for each of the tax years 1998 through 2004. For the reasons set forth Sections I and II, *supra*, defendant submits that the proposed evidence should be excluded because it impermissibly broadens the Indictment and violates defendant's Fifth Amendment rights.

The evidence should also be excluded because it is not relevant. Relevant evidence is evidence that has a tendency to make the existence of any fact that is of consequence to the determination at issue more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Here, the issue before the Court is whether defendant knowingly prepared false and fraudulent tax returns for the fourteen clients listed in the Indictment. The sheer volume of tax returns prepared by defendant in each of the tax years 1998 through 2004 has no bearing on the fourteen individual returns that form the basis for the charges in the Indictment. Since the Indictment does not even allege criminal behavior in 1998, 1999 and 2004, it is difficult to conceive what relevance the proposed evidence would have to the alleged fraudulent returns filed in tax years 2000 through 2002. Evidence regarding the volume of tax returns prepared by the defendant can have no purpose other than to show that defendant has a propensity to commit crimes, in violation of Rule 404(b).

Evidence regarding the refund rates for returns prepared by defendant should also be excluded on the grounds that the evidence is not relevant, will unnecessarily lengthen the trial and is being admitted to show propensity. The proposed evidence regarding the overall refund rates for all of defendant's clients has no bearing on whether the fourteen clients alleged in the Indictment were entitled to certain deductions, exemptions and tax credits.

To obtain a conviction, the Government must prove beyond a reasonable doubt that the deductions and exemptions alleged in the Indictment were false and fraudulent, and that defendant knew that they were false and fraudulent when he filed the tax returns. Any evidence regarding refund rates will inevitably lead to questions regarding the compilation and analysis of the data, including questions regarding the demographics of the individual tax filers. Such questioning will mislead and confuse the jury and unnecessarily lengthen the trial. *See, e.g., United States v. Aboumoussallem*, 726 F.2d 906, 912 (2d Cir. 1984)(proper to exclude evidence of uncharged crimes under Rule 403 where it would amount to a trial

within a trial risking jury confusion and undue delay). A court has discretion to exclude evidence that is only slightly probative if its introduction would confuse and mislead the jury by focusing its attention on collateral issues. *United States v. Prousalis*, 03 Cr. 1509, 2004 WL 1198495, at *8 (S.D.N.Y. June 3, 2004); *Newton*, 2002 WL 230964, at *4-5.

Finally, the Court should reject any argument that a proper limiting instruction to the jury will protect defendant against any possible prejudice from the introduction of 404(b) evidence. It is well settled that a limiting instruction is not an effective shield against the dual risks of misuse and unfair prejudice. *United States v. Forrester*, 60 F.3d 52, 60 (2d Cir. 1995). As the Second Circuit has noted, "to regard cautionary instructions as talismans for the solution to any possible prejudice problem is tantamount to effecting a repeal of the prejudice rule, which by its terms concedes the possibility that the negative aspects of some evidence may simply be unmanageable for the factfinder regardless of instructions." *United States v. Schiff*, 612 F.2d 73, 82 (2d Cir. 1979).

Conclusion

For the forgoing reasons, the Court should grant defendant's application and exclude the proposed 404(b) evidence.

Respectfully submitted,

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